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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 784

C. N. BEVANS, APPELLANT,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

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APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

Nature of the Case.

This is an appeal from the final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully committed as for contempt. The appellant, who had been personally served with a subpœna *duces tecum* to appear and give his testimony by deposition in a civil suit pending in the Common Pleas Court of Lucas County, Ohio, was committed for contempt, until he should submit to appear and testify, for his refusal, *while making no claim of privi-*

lege, to produce any of the books or records described in his subpœna, though found by the examining officer to be material, and for his refusal to answer lawful questions on oral examination.

The testimony of the appellant was sought to be taken before a notary public, under the following statutory scheme of the State of Ohio for taking testimony by deposition in civil cases. For the convenience of the Court the pertinent sections of the Ohio General Code are printed in full in Appendix A hereof.

Section 11521* provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of the deposition be given to the adverse party. Section 11535 prescribes the manner of notice and provides that the deposition shall only be used against such parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notary publics and judges. Sections 11502, 11503 and 11504 provide for the issu-

* All statutory references through this Statement, unless otherwise indicated, are to Sections of the Ohio General Code.

ance, form and service of subpœnas and subpœnas *duces tecum*. This, in brief, and so far as deemed material, is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these Sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpœna; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The Section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpœna is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally served*, the examining magistrate *may* issue an attachment to bring the intended witness before the magistrate to answer for his contempt as well as to give testimony, but provides that in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the Judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*". Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *Decamp* v. *Archibald*, 50 O. S. 618 at 626, (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Benckenstein* v. *Schott*, 92 O. S. 29 at 41. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority. (Section 12165). On the other hand, an application for release from imprisonment under Section 11514 tests not merely the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason of any action, finding or conclusion of the committing magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common Pleas suit sought to take the testimony of the Appellant Bevan.*

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* While the absence of a similar procedure in other States would furnish no ground for criticism of the statutory scheme for the administration of justice in Ohio, it is interesting and significant to note that the

Immediately following appellant's technical arrest on the commitment issued by the notary (R. 86, 159*) he applied to the Court of Appeals of Lucas County, Ohio, for his release from imprisonment as authorized by Ohio General Code, Sec. 11514 (R. 69, 101). After a full and complete review of the notary's action and the merits of appellant's objections, the Court of Appeals denied his release (R. 98, 222-226). To this judgment a writ of error was obtained from the Ohio Supreme Court and from the decision of that court

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*All references to the Record are to pages of the transcript in manuscript form.

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statutory scheme of Ohio for the compulsion of testimony by deposition or otherwise, is identical with, substantially the same, or very similar to the corresponding statutory procedure of many other States.

Statutes in the following States are identical with Ohio General Code, Sections 11510, 11511, 11512 and 11514:

Kansas.—Revised Statutes of Kansas, 1923, Chapter 60, Sections 2812, 2813, 2814, 2815, 2823.

Nebraska.—Compiled Statutes of Nebraska, 1929, Chapter 20, Sections 1229, 1230, 1231, Chapter 60, Section 107 (No section to correspond with O. G. C. Sec. 11514).

Oklahoma.—Oklahoma Statutes, 1931, Sections 278, 279, 280, 281, 296.

South Dakota.—Compiled Laws of South Dakota, 1929, Sections 2740, 2741, 2742, 2743, 2758.

Wyoming.—Wyoming Revised Statutes, 1931, Chapter 89, Sections 1715, 1716, 1717, 1718, 1805.

In the following states the corresponding statutes

affirming the Court of Appeals (R. 79, 81-94) the appellant now prosecutes this appeal to the Supreme Court of the United States.

During the interim between the judgment of the Lucas County Court of Appeals and the decision by the Ohio Supreme Court, the appellant attempted the collateral remedy of *habeas corpus* in the Federal courts. That collateral proceeding has already reached this Court and was disposed of on December 12, 1932. *Bevan* v. *Light*, October Term, 1932, No. 500, certiorari denied. For a detailed description of the numerous steps taken by the appellant to avoid

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are substantially to the same effect as Ohio General Code, Sections 11510, 11511 and 11512:

Nevada.—Nevada Compiled Laws, 1929, Sections 8985, 8987, 8988, 9002.

Oregon.—Oregon Code Annotated, 1930, Sections 9-1109, 9-1111, 9-1112, 9-1701, 9-2201.

Utah.—Compiled Laws of Utah, 1917, Sections 7133, 7135, 7136, 4253.

The following States have adopted similar statutory schemes which permit notaries or other non-judicial officers authorized to take depositions variously to summarily issue attachments or commit witnesses who disobey subpœnas or refuse to testify:

Arizona.—Revised Code of Arizona, 1928, Sections 4419, 4426, 4427.

Arkansas.—Digest and Statutes of Arkansas, 1921, Sections 4211, 4231, 4232.

Connecticut.—General Statutes of Connecticut, Revision of 1930, Section 5589.

Florida.—Compiled General Laws of Florida, 1927, Sections 4438, 4439.

and delay as long as possible his duty to testify, we respectfully refer the court to Respondent's Brief in Opposition to Petition for Certiorari, pp. 5-9, *Bevan* v. *Light*, October Term, 1932, No. 500.

The petition in the Common Pleas Court charges the defendants with a far-flung fraudulent conspiracy (R. 83, 84, 136-157). It is evident both from the objections first raised by counsel for the appellant at the commencement of the depositions (R. 108) and from the subsequent course followed by appellant that the real reason why appellant is now before this Court is not to procure his release from an imprisonment which he has never suffered but to continue, with all

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Iowa.—Code of Iowa, 1931, Sections 11341, 11358, 11359 and 12540 to 12551, inclusive.

Louisiana.—Marr's Revised Code of Practice of Louisiana, 1927. R. S. 615, page 361, and R. S. 618, page 362.

Maine.—Revised Statutes of Maine, 1930, Chapter 121, Sections 2 and 29.

Michigan.—Compiled Laws of Michigan, 1929, Sections 14228, 14229 and 14230.

Mississippi.—Mississippi Code, 1930, Section 1535.

Missouri.—Revised Statutes of Missouri, 1929, Sections 1756 and 1773.

New Hampshire.—Public Laws of New Hampshire, 1926, Chapter 336, Sections 4 and 7.

Texas.—Vernon's Annotated Texas Statutes, Title 55, Articles 3707, 3709, 3746, 3747, 3748.

Vermont.—General Laws of Vermont, 1917, Sections 1911, 1919, 1920, 1921.

West Virginia.—Official Code of West Virginia, 1931, Chapter 57, Article 4, Section 1; Chapter 57, Article 5, Sections 5 and 6.

the means at his command his effort to obstruct and delay the taking of depositions in the Common Pleas Court and the orderly administration of justice in the courts of Ohio. In short the real question here is not whether the appellant shall stand committed to jail, but whether the appellant may be compelled to give his testimony in the State courts in accordance with the procedure provided by the State for the administration of justice. The Supreme Court of Ohio has squarely decided that the plaintiff in the Common Pleas Court is entitled, as a matter of law, justice and right, to the testimony of the appellant and other defendants prosecuting sister appeals to this Court. Nevertheless the appellant now seeks further delays by raising sham and frivolous constitutional questions in a final attempt to obtain a review in this Court.

We respectfully submit that this Court should decline jurisdiction of this appeal upon the following grounds:

I. The claims of an unconstitutional exercise of authority under the Ohio statutes sustained below are not a basis of jurisdiction on appeal.

II. The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

And in the event Appellant's Statement is treated as a petition for certiorari, we respectfully submit that:

III. The claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

REASONS AND AUTHORITIES MAKING AGAINST JURISDICTION.

I.

The jurisdiction of this Court to entertain this appeal is based exclusively on the holding of the Ohio Supreme Court that Sections 11510, 11511, 11512 and 11514 of the Ohio General Code are not in violation of the Federal Constitution; and the claims, were they meritorious, of an unconstitutional exercise of authority under these statutes are not a basis of juriisdiction on appeal.

Inasmuch as there is no question involved in this case of the validity of any statute or treaty of the United States, the sole ground which can be asserted by the appellant to sustain the jurisdiction of this Court is the alleged repugnancy to the Federal Constitution of such statutes of Ohio as may have been sustained by the court below. The other claims of the appellant, assuming they could be considered as raising substantial Federal questions, do not as a matter of right, entitle the appellant to an appeal, but may only be addressed to the discretion of the Court on a petition for a writ of certiorari. *Judicial Code, Sec. 237*, 28 U. S. C. A. 344; *Zucht* v. *King*, 260 U. S. 174, 177. Therefore, the following contentions, irrespective of their substance, are improperly asserted as a basis of jurisdiction: (*a*) That appellant was deprived by the notary of notice and an opportunity to be heard; (*b*) that the notary was in fact disqualified on account of personal interest; (*c*) that the subpœna

duces tecum served upon the appellant and the order of the notary directing compliance therewith constituted an unreasonable search and seizure.

The appellant also apparently asserts that Sections 11497 and 11503 are unconstitutional as in violation of the Fourteenth Amendent (Appellant's Statement in Support of Jurisdiction, Section B, p. 3). While the contention is clearly without merit, it is, if advanced, being made for the first time in appellant's petition for, and assignment of errors on, this appeal. Since the claim was neither raised nor passed upon in the State courts, clearly it can furnish no basis of jurisdiction here. *Hulbert* v. *Chicago*, 202 U. S. 275, 280.

II.

The attack on the Ohio Statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

To give the Supreme Court of the United States jurisdiction to review the judgment of a State court, the bare averment of a Federal question is not sufficient and if it appears that the claim of unconstitutionality is insubstantial, frivolous or fictitious, or that the appeal is prosecuted solely for delay, this Court will refuse to entertain jurisdiction, although a Federal question may in form be presented in the record. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Wilson* v. *North Caro-*

lina, 169 U. S. 586, 595; *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Patterson* v. *Colorado*, 205 U. S. 454; *Parker* v. *McLain*, 237 U. S. 469, 471; *Union Pacific Railroad Co.* v. *Laughlin*, 247 U. S. 204; *Zucht* v. *King*, 260 U. S. 174, 177.

The power of the State of Ohio to require its citizens to give testimony in advance of trial in civil actions pending in its courts is not disputed by the appellant. It is only the machinery set up by the State for the carrying out of that power that is objected to. Granted the basic power of the State to enforce the duty of its citizens to testify in aid of the administration of civil justice, the particular mechanics adopted by the Legislature eighty years ago (Act of March 11, 1853, Ohio Laws, Chap. 1202, Sections 322-325) for the enforcement and administration of that basic power is a matter exclusively of internal interest and control. It should, therefore, require a case of clearly unreasonable procedural provisions to warrant the assumption of jurisdiction by the Supreme Court of the United States. *Twining* v. *New Jersey*, 211 U. S. 78, where it was stated at page 114:

> "* * * The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

A.

The contention that Sections 11510, 11511 and 11512, according to their terms, fail to provide for notice and an opportunity to be heard in violation of the Fourteenth Amendment is without substance or merit.

The analysis of Sections 11510, 11511 and 11512 (p. 3, *supra*) establishes that where a witness commits a contempt, as defined in the statute, in the presence of the examining officer, the witness may be committed without further citation or hearing. A contempt resulting from an unlawful refusal of a witness, who has appeared and been sworn, to answer or produce records on the order of the examining officer must necessarily be committed in the presence of the examining officer empowered to punish therefor, and it is elementary that under such circumstances due process does not require further notice or hearing. *Ex parte Terry*, 128 U. S. 289, 306; *McGrain* v. *Daugherty*, 273 U. S. 135, 157; *Blankenburg* v. *Commonwealth of Massachusetts*, 272 Mass. 25, 172 N. E. 209, 212, certiorari denied, 283 U. S. 819; *Middlebrook* v. *State*, 43 Conn. 257, 268, 269; *In re Willis*, 94 Wash. 180, 162 Pac. 38. There can be no question, therefore, but that the above sections, so far as they apply to the commitment of the appellant, are constitutional according to their terms.

B.

The contention that the power to enforce testimony as conferred by Sections 11510, 11511 and 11512 upon non-judicial officers, is repugnant to the Fourteenth Amendment, is an attempt to reopen a question settled beyond dispute and is wholly without foundation.

The further contention of the appellant that the notary, being a non-judicial officer, is without power to determine whether a contempt, as defined by such statutes, has been committed and that therefore the statutes violate the due process clause, is merely the old argument, somewhat refurbished, that a State may not delegate its enforcement powers to non-judicial officers and that due process requires judicial process. That such an argument is no longer tenable is beyond dispute. *Cafer, Sheriff*, v. *Caldwell*, 200 U. S. 293, 297; *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Dreyer* v. *Illinois*, 187 U. S. 71, 84.

The bald and unsupported statement of appellant that the question as to whether the witness should be imprisoned is left to the uncontrolled will of the notary (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, page 7) is in the teeth of the express wording of Sections 11510, 11512, which limits the examining officer's power and jurisdiction to commitments for unlawful refusals to answer. Thus there is no question here of the conferring of an arbitrary, despotic or unlimited power upon an officer of the State. The possibility that either a court or officer may err has never been held to make it unconstitu-

tional to vest either with power. Nor do the Ohio decisions support the claim that a notary is without power to determine whether a contempt, as defined by the statute, has been committed. The fact is that the examining magistrate, whether a notary public or a judge (and he may be either under Section 11529), does not have power to pass upon whether the evidence taken on the deposition shall be admissible as between the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. However, the examining magistrate, whether a notary public or a judge, does have the power to determine whether the witness has committed a contempt and to enforce the giving of his testimony on the deposition. *DeCamp* v. *Archibald*, 50 O. S. 618, 625; *Ex parte Jennings*, 60 O. S. 319, 328; *Ex parte Woodworth*, 6 Ohio Decisions 19, 21; 14 Ohio Jurisprudence 38; *Benckenstein* v. *Schott*, 92 O. S. 29. This is a familiar rule in Federal practice. *Nelson* v. *United States*, 201 U. S. 92, 114; *Dowagiac Mfg. Co.* v. *Lochren* (8 C. C. A.), 143 Fed. 211, 215.

The appellant, without claiming any privilege or asserting any reason other than advice of counsel (which, as stated by the Ohio Supreme Court (R. 88, 89), was no reason at all), flatly refused to give any testimony (R. 115-129). While we should regard the exercise of the statutory powers of a notary even in such a case to be clearly valid and as raising no Federal question, it is manifest that the appellant cannot raise the question and seek a declaratory judgment upon such a non-existent factual hypothesis, although

some of appellant's statements in support of jurisdiction could only thereby be made relevant.

C.

While the full, free and untrammelled judicial review provided by Section 11514 is not necessary to afford due process, it is clear that the provision of such right of review cannot violate the Fourteenth Amendment, as appears to be alleged by appellant's statement in support of jurisdiction, but that it merely further evidences the care of the State to safeguard every legitimate right of a witness.

The appellant includes Section 11514 as one of the statutes claimed to be unconstitutional (Appellant's Statement in Support of Jurisdiction, Sec. B, p. 3). It is settled that a right of appeal or review is not an essential element of due process. *Reetz* v. *Michigan*, 188 U. S. 505, 508. We have already seen that jurisdiction and power to punish for contempts, as defined in the statute, have been lawfully conferred upon a Notary Public. The provision for a review not merely of his jurisdiction but of the legality of his action was not essential to due process, but it does demonstrate the care with which the State has safeguarded every legitimate right of a witness. The appellant objects that this review does not precede the commitment of the examining officer (Appellant's Statement in Support of Jurisdiction, Sec. D, pp. 7-8). We know of no principle that when power is lawfully conferred upon any officer, it may not be exercised until his proposed action has first been reviewed by a court. How-

ever, the existence of this full, free and untrammelled review by application to any court of record in the State of Ohio does emphasize the reasonableness of the statutory scheme of Ohio for taking testimony by deposition in civil causes and does furnish a prompt and efficacious remedy for any error of the examining officer.

III.

If appellant's "Statement Disclosing the Basis of Jurisdiction" be considered by this Court as a petition for a writ of certiorari, the claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

A.

The proceedings before the Notary and the commitment of appellant did not deny him due process of law.

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has already been shown, *supra* at page 12. The action of the notary was in strict conformance to those sections and satisfied every requirement of due process of law. The appellant suggests that neither he nor his counsel received notice or were given an opportunity to be heard, that the notary did not conduct a formal hearing as to whether the witness' deliberate refusal to testify or produce any of the material called for by the subpœna *duces tecum* constituted a contempt and that the notary signed and issued the com-

mitment in the absence of the appellant (Appellant's Statement Disclosing the Basis of Jurisdiction, page 8). As to these points the record discloses that the appellant appeared pursuant to the notice and order of a subpœna *duces tecum* personally served upon him, which closed with the words "Hereof fail not under penalty of the law" (R. 106). In disregard of the ample notice afforded by his subpœna and the oral command of the notary, appellant refused to testify or produce any of the records called for (R. 88, 89, 115-129). He attempted to show cause why he should not answer by stating that he refused on advice of counsel, and further through his counsel why he should not be required to answer or obey the subpœna *duces tecum* (R. 108, 109, 117). His contempt, as has hereinbefore been shown, was comitted in the presence of the magistrate authorized by law to commit him therefor without further citation or hearing. It is clear both on principle and authority that one committing a contempt under such circumstances cannot defeat the exercise of that power by leaving before process of commitment can be prepared or before he is apprehended by the sheriff or bailiff. *Ex parte Terry*, 128 U. S. 289, 311; see also page 12, *supra*. In the determination of whether the commitment of a witness for contempt committed in the face of the committing power without further notice or opportunity to be heard constitutes due process of law, it is manifestly immaterial whether the authority of the committing power so to punish for contempt rests upon a valid statute or is inherent.

Furthermore, in the instant case the appellant has had the benefit of a full, free and untrammelled review, pursuant to the provisions of Section 11514, by one of the State courts of appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State. *Frank* v. *Mangum*, 237 U. S. 309, 327.

B.

The suggestion that the Record discloses a disqualifying pecuniary interest of the notary is without basis in fact or law; but were such disqualifying interest assumed to exist, the Record would establish both that it was waived by the appellant and cured by the subsequent review.

The notary had no disqualifying interest in fact. It was so found by the Supreme Court of Ohio (R. 82, 93). He is an official of the State, appointed for the express purpose of presiding at the taking of depositions, and it can no more be said that he is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of *habeas corpus* or a motion for a restraining order is in the employ of the applicant therefor. He is compensated for the services actually performed; and his compensation for such services is no greater and no less whether or not he commits the witness. The suggestion that the length or extent of his services might be affected is fanciful and sustained by no authority.

The appellant appeared and was represented by counsel. He knew that the notary was taking the testimony and would transcribe it. His counsel ordered copies of the transcription (R. 186), and thus the "employment", if any, was mutual. The appellant and his counsel knew that under the laws of Ohio it would be the duty of the notary to order him to produce material records and answer material questions and to punish him for contempt if he failed to obey. The notary did order him to produce pertinent records and to answer material questions but neither he nor his counsel made any objection to the notary's qualifications.

This contention was first raised by appellant in his amended application to the State Court of Appeals (R. 133, 186). If the disqualification had in fact existed, as it did not, it was waived by failure to object. *State ex rel. Bowman* v. *Commissioners*, 124 O. S. 174; *Tari* v. *State*, 117 O. S. 481.

But if it be assumed that a disqualification did in fact exist and that it has not been waived, that circumstances did not deprive the notary of jurisdiction; and the subsequent hearing on the merits by a disinterested court under Section 11514, sought and obtained by the appellant, would have cured any such supposed defect and satisfied every requirement of due process of law. *Ex parte Meeks*, 20 Fed. (2d) 543; *Tari* v. *State*, 117 O. S. 481; *Hill* v. *State*, 298 S. W. 321, 174 Ark. 886; *Hitt* v. *State*, 115 So. 879, 149 Miss. 718; *Ex parte Lewis*, 288 Pac. 354 (Okla. 1930); *Brooks* v. *Town of Potomac*, 141 S. E. 249, 149 Va. 427.

C.

The contention that the subpœna duces tecum, as an unreasonable search and seizure, violated the Fourteenth Amendment, is clearly untenable.

The subpœna *duces tecum* as found by the Supreme Court of Ohio (R. 82, 92) does not constitute an unreasonable search and seizure in view of the broad scope and ramifications of the fraudulent conspiracy and the fraudulent misrepresentations set forth in the petition in the Common Pleas Court. The same view was taken by the State Court of Appeals (R. 224). However, even if the contrary be assumed for the sake of argument, it is clear that no Federal question is thereby presented. The personal rights, privileges and immunities set forth in the first eight Amendments of the Federal Constitution, including the safeguard against unreasonable searches and seizures provided in the Fourth Amendment, are not within the "privileges and immunities" covered by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U. S. 78, 98, 99. And therefore an unreasonable search and seizure may be made by a State officer under State authority without violating the Federal Constitution. *Weeks* v. *United States*, 232 U. S. 383.

We respectfully submit that the record presents no substantial Federal question which would warrant this Court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff. Any

further delay subjects the Common Pleas plaintiff to the hazard if not probably to the loss of essential evidence. Under these circumstances justice as well as law requires a prompt refusal of jurisdiction.

Respectfully submitted,

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APPENDIX A.

Sections of the General Code of Ohio Involved, Cited or Discussed.

"Sec. 11497. *Corporations; officers may be examined.* At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony." (R. S. Sec. 5243.)

"Sec. 11502. *Subpœna on taking depositions.* When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer (R. S. Sec. 5248.)"

"Sec. 11503. *What subpœna to contain.*—A subpœna shall be directed to a person named therein and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence (R. S. Sec. 5247.)"

"Sec. 11504. *Service of subpœna.*—A subpœna may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed (R. S. Sec. 5246.)"

"Sec. 11510. *Contempt of court.* Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer

by whom the attendance or testimony of the witness is required (R. S. Sec. 5252.)"

"SEC. 11511. *When attachment may issue.* When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him (R. S. Sec. 5253.)"

"SEC. 11512. *Punishment for contempt.* Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition (R. S. Sec. 5254.)"

"SEC. 11514. *How witness released from imprisonment.* A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (R. S. Sec. 5255.)

"SEC. 11521. *How testimony taken.* The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination (R. S. Sec. 5261.)"

"SEC. 11525. *When deposition may be used.* The deposition of a witness may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required (R. S. Secs. 5265, 5281)."

"SEC. 11526. *What deposition taken.* Either party may commence taking testimony by deposition at any time after service upon the defendant (R. S. Sec. 5266)."

"SEC. 11529. *Officers authorized to take depositions.* Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission (R. S. Sec. 5269)."

"SEC. 11534. *Notice to take deposition.* Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place where it will be taken. In case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice

specified that his deposition would be taken (R. S. Sec. 5273)."

"SEC. 11535. *Service of Notice.* Such notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent. The deposition shall only be used against such parties as are served with notice in one of the modes prescribed. It also must be served so as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice. If so stated in the notice, the examination may be adjourned from day to day (R. S. Sec. 5273.)"

"SEC. 11537. *By whom deposition written.* The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness (R. S. Sec. 5275.)"

SEC. 12165. *When writ not allowed.* If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate *had jurisdiction to issue the process,* render the judgment, *or make the order, the writ shall not be allowed;* or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order (R. S. Sec. 5729.)" (Italics ours.)